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U.S. Developments

The FTC Amends Its Guides For Advertising Payments and Services

By Irving Scher – New York, NY

On Sept. 24, 2014, the Federal Trade Commission (FTC) issued revised Guides for Advertising Allowances and Other Merchandising Payments and Services, effective Nov. 10.[1] The original Guides were issued in 1969 in response to a Supreme Court recommendation a year earlier in *FTC v. Fred Meyer, Inc.*[2] and are commonly referred to as the "*Fred Meyer* Guides." They address most issues faced by sellers in order to comply with the requirements of Sections 2(d) and (e) of the federal Robinson-Patman Act (RPA) – the provisions dealing with discriminations in the offering of advertising allowances and services to customers.

Background

The *Fred Meyer* Guides were last revised in 1990. Since then, the Commission has instituted only one RPA case of any nature.[3] Indeed, it last brought a case involving the provisions addressed by the Guides in 1988 – a suit that it thereafter voluntarily dismissed.[4] Because the RPA encourages *price rigidity* (in contrast to the focus of the Sherman Act on *price competition*), in 2006, the then FTC Chair recommended repeal of the statute,[5] as did a presidentially appointed Commission the following year.[6] That recommendation was thereafter endorsed by one of the current FTC Commissioners.[7]

In this issue

Of most significance, the Supreme Court continually has stressed that the RPA – not just §2(a), its pricing provision – should be interpreted narrowly in cases involving alleged discriminations among customers – secondary-line discriminations. Such cases involve restraints on competition within a supplier's own brand – *intrabrand* competition – rather than the *interbrand* competition among suppliers which the Court has often declared to be the "primary concern of antitrust law." Significantly, in its 1996 *Volvo* decision the Court stressed that the RPA "signals no large departure from that concern."[8] The Supreme Court made three key points in that decision: (i) it would construe the RPA consistently with the broader policies of the Sherman Act that encourage pricing flexibility rather than pricing rigidity; (ii) it would resist interpretations geared to the protection of existing competitors rather than to the stimulation of interbrand competition; and (iii) it would much prefer to see cases that involve discriminations favoring powerful buyers.[9]

Accordingly, when the FTC announced two years ago that it would consider revising the *Fred Meyer* Guides for the first time in 22 years, most observers anticipated that it would loosen constructions of the promotional RPA provisions so as to make the Guides more consistent with the Supreme Court's teachings in *Volvo*.

Unfortunately, that was not done. As approved 5-0 by the FTC Commissioners, the revised Guides reflect anachronistic views protective of intrabrand competition that were in vogue when the Guides were written 45 years ago, and which disregard a seller's need to compete effectively against the sellers of other brands. The revisions include only minor changes, largely of a non-substantive nature, and provide little guidance to sellers or their customers. For example, beyond merely acknowledging the hardly controversial proposition that the Internet can be used as an advertising vehicle, the revisions and FTC comments that accompanied them provide no guidance whatsoever as to what constitutes advertising on the Internet, or how a seller should calculate the amount to pay a provider for such advertising. Instead, the FTC's comments merely advise that "a seller's application of common sense and good faith will be relevant" in determining the amount to pay for such advertising services.[10]

For brevity's sake, highlighted below are just a few examples of the FTC's refusal to follow the Supreme Court's recommendations about the need to construe the RPA in a manner that brings it closer to the basic antitrust principles embodied in the Sherman Act.

Competitive Harm

When he was a Judge on the First Circuit Court of Appeals, Supreme Court Justice Stephen Breyer stressed that §2(e), one of the two promotional provisions addressed in the *Fred Meyer* Guides, "like the rest of the Robinson-Patman Act, is aimed at significant harm to competition . . . ."[11] In response to the FTC's requests for public comments concerning possible revisions to the Guides, most of the seven organizations that filed submissions in 2013 urged adoption of this basic antitrust principle in the Guides. The FTC rejected the approach, declaring instead that the promotional provisions do not require any proof of competitive harm, because they are intended "to prevent evasions" of §2(a), the price discrimination provision. However, since passage of the statute that is no longer the case, because a plaintiff has fewer hurdles to clear in order to establish a violation of the promotional provisions. Today, a defendant would rather defend a suit under the price discrimination provision.

Moreover, ignoring Justice Breyer's opinion, the FTC erroneously declared that there was no court decision suggesting consideration of competitive harm in the enforcement of the promotional provisions.[12] The Commission added that the Supreme Court's 2006 recommendation in *Volvo* that the entire "Act" should be interpreted in a manner consistent with the Sherman Act was irrelevant, because that decision involved only §2(a), which addresses price, not promotional, discriminations.

"Proportionalizing" Promotional Offers

Guide 9 states that promotional services and allowances should be made available to competing customers "on proportionally equal terms." The Commission was urged by commenting parties to revise its prior view that a seller must base its advertising or promotional reimbursement solely on the retailer's cost for providing the services involved. It was asked to recognize that payments could instead be made based on the value of the services to the seller. The FTC rejected this recommendation because it was concerned that adopting a standard based on the value to the seller of the promotional services involved "might facilitate the concealment of price discrimination, contrary to the intent underlying the Act."[13]

However, the Supreme Court specifically adopted a "value" standard in its 1990 *Hasbrouck* decision.[14] That case involved seller payments for distribution functions provided by a customer, such as warehousing. The Supreme Court declared that such payments do not violate §2(a) so long as they accord due recognition to the reasonable "value" to the seller of the marketing functions performed by the customer – regardless of the cost involved. The Court responded to the concern that a seller may overpay for such services by requiring that the payments should be based on the "reasonable" value of the services to the seller.

The FTC refused to adopt this approach in the revised Guides, however, because *Hasbrouck*, like *Volvo*, involved price discrimination subject to §2(a), rather than the promotional provisions of the RPA.[15] The FTC did not explain why a seller's reasonable determination of the value of a buyer's distribution services is sufficient to justify a payment for such services, but insufficient if the services involve advertising or promotion. It cannot be because §§2(d) and 2(e) were intended to prevent evasions of §2(a).

The Commission's refusal to allow a seller to pay for advertising and promotional services based on their reasonable value to that seller, harms both sellers and the retailers that provide high value services at comparatively low cost. Internet retailers, whose marginal advertising costs are minimal, but get millions of visits to their site would be grossly underpaid for their high value services if a "cost" standard is strictly observed, as would brick and mortar retailers providing display services in high traffic areas, be they a window on Madison Avenue or the checkout counter in a busy supermarket. Certainly, such an outcome determined by a cost standard does not reflect "common sense."

Buyer Liability

Buyer inducement of discriminatory promotional payments and services are not subject to the RPA. Congress limited §2(f), the provision specifically addressed to buyer liability, to a seller's price discrimination subject to §2(a). The FTC noted, however, that §5 of the FTC Act, which is enforced solely by the FTC, does apply to customers who knowingly induce discriminatory promotional allowances and services.

Nevertheless, despite refusing to give any credence to Justice Breyer's view that enforcement of §§2(d) and 2(e) against sellers should be aimed at practices that create significant harm to competition, the FTC states in the Guides that it will enforce §5 against buyers only in instances "where there is likely injury to competition."[16] Ironically, this policy potentially protects the very same power buyers identified by the Supreme Court in *Volvo* as being its main concern.[17]

Conclusion

As noted at the outset, this Article has addressed only a few of the failings of the revisions to the FTC's *Fred Meyer* Guides published by the Commission in September. There are other portions of the Guides as much or more out-of-step with current law and basic antitrust principles that merit discussion as well (and, some day, perhaps to meaningful revisions by a differently constituted FTC). These failings include: a narrow view of the statutory "meeting competition" defense; a determination that the inclusion of a description of a seller's advertising program on its website is insufficient to provide the required notice of its availability to customers; a definition of "competing customers" that includes retailers who only occasionally purchase a supplier's products; refusal to consider the totality of a seller's combined price and promotional payments to a retailer when evaluating RPA compliance; and a view that §§2(d) and (e) may apply to advertising payments relating to intrastate sales that are not covered by §2(a).

The Guides do not have the force and effect of law, and are not independently enforceable. However, lawyers, industry, and, most importantly, the courts have generally relied on them as accurate statements of the law. Sadly, the FTC has refused to limit or reject outdated interpretations of the RPA that go back 40 years or more. At that time there was no interest in moving the statute closer to the overall goal of the antitrust laws to foster interbrand competition, rather than to protect smaller, typically inefficient, competitors. Times have changed, as reflected in the Supreme Court's 2006 admonitions about the RPA in *Volvo*. Yet, the revised Guides continue to promote uniformity and rigidity in promotional practices that ultimately hamper interbrand competition without providing any consumer benefits.

While there is not even a suggestion that the FTC will start enforcing the RPA again, the revised Guides may very well encourage unwarranted private litigation under a statute that, as still applied by the FTC, is fundamentally inconsistent with basic antitrust policy.

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[1] 16 CFR Part 240.
[2] 390 U.S. 341 (1968).
[3] *In re* McCormick & Co., 2000 WL 264190 (FTC 2000).
[4] *See In re* Harper & Row Publishers, Inc., 122 F.T.C. 113 (1996).
[5] Statement of Deborah Platt Majoras, Chairman, FTC, Before Antitrust Modernization Commission, at 5-6 (March 21, 2006).
[6] Report, Antitrust Modernization Commission, Trade Reg. Rep. (CCH) ¶50,222, at 49,949-60 (Apr. 3, 2007).
[7] *See* NAW Legal Advisory, http://www.naw.org/govrelations/advisory.php?articleid=506
[8] *Volvo Trucks N. Am. Inc. v. Reeder-Simco GMC, Inc.* 546 U.S. 164, 180-81 (2006) (hereinafter "*Volvo*").
[9] *Id.*
[10] 79 Fed. Reg. 188, at 58248 (Sept. 29, 2014).
[11] *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17, 25 (1st Cir. 1981)
[12] 79 Fed. Reg. 188, at 58247 (Sept. 29, 2014).
[13] 79 Fed. Reg. 188, at 58250 (Sept. 29, 2014).
[14] *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 562 (1960).
[15] *Id.*
[16] *Id.* at 58251.
[17] *Volvo,* 546 U.S. at 873.

Department of Justice Emphasizes Importance of Antitrust Compliance Programs In Recent Policy Speeches

By James I. Serota and Ryan F. Harsch – New York, NY

Two top officials at the United States Department of Justice, Antitrust Division (DOJ), Assistant Attorney General (AAG) Bill Baer[1] and Deputy Assistant Attorney General (DAAG) for Criminal Enforcement Brent Snyder,[2] recently issued remarks on the importance of corporate antitrust compliance policies in the area of criminal antitrust enforcement. These remarks emphasized the importance of creating a culture of antitrust compliance and the hallmarks of effective compliance programs. The DOJ provided few specifics, but this is a topic that has been seldom discussed by the Antitrust Division, so the mere fact that these two enforcers spoke on the issue on consecutive days signals that the DOJ takes compliance programs very seriously. In an era of increased criminal antitrust enforcement, these comments serve as an important reminder that effective antitrust compliance policies are a critical tool for preventing antitrust violations and detecting them at an early stage if they do occur, which can significantly mitigate the potential consequences.

Background – A Primer on Criminal Antitrust Enforcement

Criminal prosecution of antitrust violations is typically pursued by the DOJ in cases involving serious horizontal antitrust conspiracies, such as price-fixing, market allocation and bid rigging. A criminal violation of the Sherman Act carries serious consequences. It provides for felony convictions that can lead to personal fines of up to $1,000,000 per offense and/or imprisonment for as long as 10 years. In addition, a company is subject to fines of up to $100,000,000 for each offense.[3] Individuals recently have been sentenced to fines of up to $10 million and prison terms of up to three years, and fines between $100 million and $300 million have been imposed on companies for price-fixing in the video components and automobile parts industries. Criminal enforcement has also been on the rise in recent years. In 2013, the DOJ issued over $1.1 billion in fines for criminal antitrust violations, and the average length of prison sentences has been steadily rising since 1990.[4]

In addition to prison sentences and fines, antitrust violations also expose a company to long-term or even permanent injunctions which could have a significant impact on its ongoing business. Companies subject to criminal antitrust prosecutions are also susceptible to private class action lawsuits bought by injured customers seeking treble damages and attorneys' fees, as well as possible enforcement actions by state attorneys general under state antitrust laws, which are often empowered to bring their own treble damage suits on behalf of injured consumers in their states. Of course, antitrust prosecutions also often result in collateral consequences such as negative publicity and distraction from the company's business.

The Importance of an Effective Antitrust Compliance Program

Because the consequences of a criminal antitrust violation are quite serious, the first and most obvious reason for implementing an effective antitrust compliance program is to prevent antitrust violations from occurring in the first place. If an antitrust violation does occur, however, a compliance program can also offer a number of benefits to help a company to mitigate the worst of the potential consequences.

Before discussing the benefits of a compliance program, it should first be stressed that the mere existence of a compliance program will not likely protect a company from being prosecuted or reduce its punishment in the event of a criminal prosecution by the DOJ. AAG Baer and DAAG Snyder both confirmed that the DOJ rarely recommends that companies receive credit at sentencing simply for having a pre-existing compliance program. The reason for this, according to the Antitrust Division, is that if a compliance program failed to prevent or stop the violation at an early time, then the company does not deserve any credit for the program.[5]

In a notable shift in position, however, DAAG Snyder indicated that the DOJ is "actively considering ways in which we can credit companies that proactively adopt or strengthen compliance programs after coming under investigation." However, he stated that the Division has not "finalized [its] thinking in this area." It remains to be seen whether this will result in an official change in policy.

Regardless, when implemented properly, a compliance program can allow a company to detect violations at an early stage and take proactive steps to address them. Most notably, as explained by AAG Baer, under the DOJ's Corporate Leniency Program, the Division will not prosecute the first company to admit its role in a cartel, identify its co-conspirators, and cooperate with the DOJ's investigation. If granted leniency, the company can stand to avoid significant fines and possible prison sentences. AAG Baer stressed that leniency applicants must be prepared to provide real cooperation, including conducting an internal investigation, providing detailed proffers, producing translations of documents, and making witness available for interviews. In addition, companies seeking leniency must provide "complete and candid testimony about the full scope of his or her wrongdoing," including in all markets. Companies who seek to limit their responsibility may find their request for leniency denied. It should also be noted that cooperation with the Division does not foreclose prosecution for other potential crimes by other law enforcement agencies.

Even if a company is unable to take advantage of the leniency program because it is not the first member of the conspiracy to self-report, AAG Baer clarified that a company that accepts responsibility by pleading guilty and providing cooperation can receive a lower culpability score under the Sentencing Guidelines and therefore a lower fine range. Early cooperation increases the chances that the company will be able to provide substantial assistance to the DOJ, which is taken into account by the Division when it makes sentencing recommendations.

In addition, having an effective compliance policy can help a company avoid certain burdensome penalties. For example, if a company that comes under investigation lacks a compliance program and makes no effort to strengthen it, it is far more likely to receive probation. Second, the existence of a compliance program may avoid the appointment of a corporate compliance monitor. Although the DOJ has only sought the appointment of a monitor in one criminal case, both DAAG Snyder and AAG Baer indicated that the Division will take a more aggressive approach in the future in seeking monitors in cases where companies either refuse to recognize their wrongdoing, keep culpable senior executives in positions of substantial authority, or otherwise demonstrate a risk of recidivism. Both officials pointed to the DOJ's approach in the AU Optronics case as an example of situations where appointment of a monitor was appropriate because the defendant failed to accept responsibility for its conduct, did not attempt to implement a compliance program, and continued to make defiant public statements.

What Constitutes an Effective Compliance Program?

Given the importance of an effective compliance program in both preventing and mitigating the consequences of criminal antitrust violations, the next logical question is: what is an "effective" compliance program? Unfortunately, the DOJ historically has not provided precise guidance as to what it entails, and neither AAG Baer nor DAAG Snyder suggested that it intends to change that stance any time soon. Its view is that a "one size fits all" approach would not work, because a compliance program must be tailored to suit the needs of the company's business and its industry. However, both AAG Baer and DAAG Snyder made some points of general application that are worth noting:

> Effective compliance must "start at the top," meaning that senior executives and members of the Board of Directors must take compliance obligations seriously and make compliance a part of the corporate culture.

> The entire company must be involved, which means educating and training managers and most employees, particularly those with sales and pricing responsibilities, and may also include training subsidiaries, distributors, agents, and contractors. It also allows all employees to report potential violations without fear of retaliation.

> A compliance program must be proactive, meaning that there should be ongoing monitoring and auditing of antitrust compliance as well as periodic evaluation of the compliance program itself.

> A company should be willing to discipline employees who participate in antitrust violations or fail to prevent them from happening. This is a key point that was emphasized by both AAG Baer and DAAG Snyder. Although the DOJ does not require termination of employees, it made clear that retention of culpable employees raises serious questions about the company's commitment to antitrust compliance.

> The policy should be updated and strengthened when a company does discover criminal antitrust violations in order to ensure that they do not happen again.

> Companies can look to external sources for guidance, such as the U.S. Sentencing Guidelines and the ICC Antitrust Compliance Toolkit, both of which discuss principles of effective compliance programs.

Companies that follow these core principles — top-down commitment, comprehensive training, auditing, and disciplinary measures — will have taken a major step toward implementing an effective antitrust compliance policy. More generally, criminal antitrust exposure can be reduced if companies instruct their employees to follow a cardinal rule: competitors should never talk about how they do or should do business. This includes discussing information such as pricing, pricing terms, distribution policies (such as plans to change geographic territories), or methods of doing business. Personnel who are in a position to have frequent interactions with competitors — such as at trade association meetings, charitable events, or other meetings with competitors — are in positions of particular risk and should be instructed not to participate in any such discussions. While these rules are applicable in all industries, it should be noted that the pharmaceuticals, health care, and technology (particularly raw materials and components) industries have been a particular focus of antitrust enforcement authorities in recent years, so companies in those industries should be particularly vigilant.

Companies crafting compliance policies should be mindful that so-called "vertical" agreements between suppliers and customers (such as policies that restrict customer pricing, exclusive dealing, tying arrangements or customer/territorial restraints) are also subject to antitrust scrutiny. Although horizontal conspiracies are typically the focus of criminal enforcement, vertical arrangements are often litigated in private lawsuits. Moreover, the law in these areas is something of a patchwork, with rules that may vary from state to state.[6] As a result, effective compliance programs should require review of such policies by the Legal Department and/or outside counsel before being implemented.

[1] "Prosecuting Antitrust Crimes," Bill Baer, Department of Justice, Sept. 10, 2014 (Remarks as Prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium), *available at* http://www.justice.gov/atr/public/speeches/308499.pdf.

[2] "Compliance Is a Culture, Not Just a Policy," Brent Snyder, Department of Justice, Sept. 9, 2014 (Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop), *available at* http://www.justice.gov/atr/public/speeches/308499.pdf.

[3] 15 U.S.C. § 1, 2, 3.

[4] *See* "Criminal Enforcement – Fine and Jail Charts Through Fiscal Year 2013," *available at* www.justice.gov/atr/public/criminal/264101.html.

[5] The Sentencing Guidelines do expressly provide for a reduction in culpability score for a company that had in place an "Effective Compliance and Ethics Program." U.S.S.G. § 8C2.5(f). On its face, then, the DOJ's position may appear somewhat inconsistent with the Sentencing Guidelines, which state that "the failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct." *Id.* §8B2.1(a). If, for example, a violation were the result of activities by a "rogue" employee within the company without the knowledge or participation of management, it could be argued that having an effective compliance program should still be taken into account at sentencing. However, according to DAAG Snyder, the DOJ's position is that companies other than leniency applicants rarely self-report violations, and the Sentencing Guidelines state that a company that "unreasonably delayed reporting the offense to appropriate governmental authorities" is not entitled to a reduced culpability score for an effective compliance program. *Id.* § 8C2.5(f).

[6] As just one example, the Supreme Court now takes the view that "minimum resale price maintenance" is subject to the "rule of reason," *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), while some states continue to consider this practice to be *per se* unlawful under the antitrust laws.

'Class Action, Lots of Foam? That'll Be $1 Billion.'

By Scott Martin – New York, NY

Upholding a $1.06 billion judgment in favor of a national class of industrial purchasers of polyurethane, a three-judge panel of the U.S. Court of Appeals for the 10th Circuit drew renewed attention to the still-formidable risks (or rewards, depending upon one's perspective of this record jury verdict) in taking price-fixing class actions to trial. The panel's Sept. 29, 2014 decision[1] rejected in its entirety an appeal by Dow Chemical Corporation (Dow) and, in so doing, upheld: (i) the trial court's finding that common questions of conspiracy and classwide impact predominated, underscoring that the Supreme Court's decisions in *Dukes*[2] and *Comcast*[3] are not defense silver bullets on class certification; and (ii) the jury's damages award, which was markedly different (here, less) than that offered by plaintiffs' expert, even though the jury did not have access to the expert's underlying calculations as a basis.

Dow is seeking *en banc* review by the 10th Circuit.

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Dow was the sole remaining defendant at the jury trial in Kansas federal court of the direct purchaser class action for alleged price-fixing of polyurethane products (most commonly used in foam cushions and foam insulation). Dow sustained a $400 million damages verdict, which, after trebling and then reduction by $140 million for settlements by other defendants, resulted in a $1.06 billion judgment. The district court denied Dow's motions for decertification of the class and for judgment as a matter of law.

Before trial, Dow had moved to exclude the damages testimony of plaintiffs' statistical expert, Dr. James McClave, and to decertify the class (the latter motion being made the day before trial). Following the verdict, the district court granted plaintiffs' request to permit allocation of damages according to Dr. McClave's model, adjusted *pro rata* to allow for the jury's reduction from $497 million to $400 million. After both the conclusion of the trial and the Supreme Court's decision in *Comcast*, Dow renewed its motion to decertify the class – arguing that Dr. McClave's damages model did not provide the required nexus between the liability theory and impact on class members – and the district court denied the motion.

Among Dow's arguments on appeal was that the class should not have been certified because common questions did not predominate over individual ones. The appellate panel noted that the polyurethane market involved a "myriad of products, pricing structures, individualized negotiations, and contracts"[4] reflected in long-term contracts as well as spot purchases, and that announced price hikes did not always result in actual price increases due to individual negotiations. Plaintiffs' class expert – a familiar one, Dr. John Beyer – opined that a price-fixing conspiracy would affect all purchasers in the class. In certifying the class, the district court reasoned that product price lists and parallel price-increase announcements in the industry could establish an "artificially inflated baseline" price that would cause market-wide impact notwithstanding individual negotiations. For purposes of the threshold liability issues, then, the district court found class certification to be appropriate, and noted that the damages case could be bifurcated or the class later decertified as to damages if individualized questions predominated on those issues.[5]

On appeal, Dow argued that class certification ran afoul of *Dukes* because Dow had been denied the right to show in individualized proceedings that some class members suffered no injury.[6] The appellate panel disagreed. While conceding that some class members might have avoided being injured by individual negotiations or switching to a substitute product, the panel declared that it was not an abuse of discretion for the district court to conclude that the common questions of conspiracy and, importantly, impact would predominate, particularly when "there is evidence that the conspiracy artificially inflated the baseline for price negotiations."[7] The appellate panel noted that trial testimony by some of Dow's witnesses (which, the trial having been completed, was thus available to the district court for consideration on the renewed motion for decertification) acknowledged that price increase announcements had affected the starting point for price negotiations.[8]

Dow also raised on appeal a *Comcast* argument that Dr. McClave (also the damages expert in *Comcast*) had employed a defective model because he had failed to distinguish between the impact and damages attributable to the liability theory actually pursued at trial and a theory that was not. In *Urethane*, plaintiffs dropped a customer allocation theory before trial, proceeding only on a price-fixing theory. As a threshold matter, the appellate panel observed that the *Urethane* plaintiffs, unlike the Comcast plaintiffs, had not made the unusual concession that class certification required showing a common methodology for proving classwide damages. The panel also rejected this argument because, unlike in *Comcast*, Dow waited until after the trial to raise this issue – by which time Dr. McClave had already testified in the plaintiffs' case as it was actually presented, and the district court therefore had the discretion to find a "fit" between the nationwide price-fixing theory and classwide damages.[9]

The 10th Circuit panel also rejected Dow's arguments that the jury's reduction of Dr. McClave's damages figure was without an evidentiary basis. The court enumerated several possible bases for the reduction and noted that it was appropriate for a jury to make such adjustments even if it lacked the exact numbers to do so with "mathematical clarity."[10]

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Author's postscript: At a well-known annual antitrust economics conference barely a decade ago, a speaker asked for a show of hands of those who had successfully defeated class certification in a horizontal price-fixing case. Mine was one of only three hands that went up among scores of well-respected litigators. The odds have certainly improved for defendants in the intervening years with the Supreme Court's decisions in *Dukes* and *Comcast*, as well as circuit court decisions requiring both satisfaction of class certification elements by a preponderance of the evidence and resolution of factual disputes relevant to class certification, like the Third Circuit's decision in *Hydrogen Peroxide*.[11] From this practitioner's view, the *Urethane* decision does not signal a step backward in this trend, but rather a demonstration that in the unusual circumstances of post-trial hindsight following the rare occurrence of a jury verdict in a price-fixing case, a district court's discretion on class certification can have enormous impact. While case law may have shifted, to the extent that the record available to a jury can reasonably be read to support classwide impact and a damages award, the respect afforded its decision by appellate courts remains constant and profound.

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[1] *In re Urethane Antitrust Litig.*, No. 13-3215 (10th Circ. Sept. 29, 2014) (*Urethane*).

[2] *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011) (class certification inappropriate in gender discrimination case where evidence did not show company-wide discrimination policy: what matters to class certification is not merely raising common questions, but capacity of the classwide proceeding to generate common *answers*).

[3] *Comcast Corp. v. Behrend*, ___ U.S. ___, 133 S. Ct. 1426 (2013) (class certification inappropriate where plaintiffs conceded need for a method to prove classwide damages through a common methodology, but expert's model

measured aggregate damages based on four theories of antitrust impact, three of which had been rejected by the court).

[4] *Urethane*, Slip Op. at 4.

[5] *In re Urethane Antitrust Litig.*, 237 F.R.D. 440, 452 (D. Kan. 2006).

[6] Dow also argued that Dr. McClave's extrapolation techniques in his modeling amounted to an improper "trial by formula.' The appellate panel rejected this argument on the ground that such extrapolation was not used to prove liability but rather only to approximate damages, which is not prohibited by *Dukes*. *Urethane*, Slip Op. at 18-19.

[7] *Urethane*, Slip. Op. at 14 (citing *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 287 F.R.D. 1, 61 (D.D.C. 2012), *vacated in part on other grounds*, 725 F.3d 244 (D.C. Cir. 2013)).

[8] *Urethane*, Slip Op. at 15.

[9] *Id.*at 23.

[10] *Id.* at 43-44 (citations omitted).

[11] *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305 (3d Cir. 2008).

Europe Developments

EU Competition Law Compliance: An Altered Legal Landscape

By Hans E. Urlus, Emilie van Hasselt, Teresa Charatjan, and Jacomijn Christ* – Amsterdam

EU competition law prohibits the restriction of competition by agreements between competitors that may affect trade between Member States and have as their object or effect the restriction of competition (Article 101 TFEU). An agreement will fall outside this prohibition if it is not capable of appreciably restricting competition or trade between Member States. This *de minimis* principle was established by the European Court of Justice (ECJ) in 1969, *inVölk v Vervaecke*, where the ECJ held that *"…an agreement shall fall outside the prohibition when it has only an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market of the product in question."*[1] In order to offer guidance on how to interpret the *de minimis* principle as established by the ECJ, the European Commission (the Commission) periodically has issued a Notice, outlining that the Commission will not start proceedings in cases which fall below the thresholds set out in the *De Minimis* Notice.

The most recent *de minimis* Notice, issued in 2001 was, due to developments in ECJ case law, revised again this summer. The Commission clearly stated in the notice that, even if the market share thresholds are not reached, a restriction "by object" is nevertheless assumed to appreciably restrict competition and therefore does not fall within the *De Minimis* Notice safety zone. This appears to follow the 2012 ECJ Expedia ruling, in which the ECJ emphasized that *"an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition."*[2] The revised *De Minimis* Notice supported this view.[3]

On Sept. 11, 2014, however, the ECJ drastically altered the legal landscape with its judgment in *Groupement des Cartes Bancaires*,[4] which clarified the application of "by object" restrictions, focusing on its 2013 *Allianz Hungária*[5] ruling rather than, as the Commission had done, on the earlier ECJ *Expedia* ruling. The facts of the ECJ's *Groupement des Cartes Bancaires* decision merit discussion.

Facts

The *Groupement des Cartes Bancaires* (CB) – an economic interest grouping – was created in 1984 in France so that holders of a CB-card issued by a member of CB could make payments to affiliated traders, and/or make withdrawals from automatic teller machines operated by members. In 2002, CB adopted three pricing measures: (i) a fee payable by a CB member whose CB-card issuing activity exceeded its activity in affiliating new traders to the system; (ii) a reform of the membership fee for new members, which consisted in a fixed sum and a supplementary membership fee for members whose number of CB-cards in stock exceeded a certain threshold at a given moment; and (iii) a fee per CB-card issued, payable by "dormant" members (those who were inactive or not very active before the date of entry into force of the new pricing measures). As required, CB notified the Commission of these new measures.

After two statements of objections from the Commission, CB submitted offers of commitments which the Commission found to be out of time and inadequate. Subsequently, the Commission declared that the association shut out new entrants from the market for issuance of payment cards in France. According to the Commission, the measures were applied in such a way as to hinder the issuing of cards by smaller banks prepared to offer cards at lower prices. The Commission concluded that the measures were anti-competitive both by object and by effect, and therefore breached article 101 of the Treaty on the Functioning of the European Union (TFEU).

CB appealed the decision, but the General Court (GC) dismissed the appeal holding that the CB pricing measures constituted a "by object" restriction of competition, and therefore that the effects of the measures did not have to be considered. CB appealed to the ECJ, arguing that the GC should not have considered the measures to be a restriction of competition by object.

The ECJ Ruling

The ECJ emphasized that "by object" restrictions comprise certain types of coordination between competitors that reveal such a significant degree of harm to competition that there is no need to examine their effects — similar to the U.S. rule of *per se* illegality. The ECJ stressed, however, that under settled case-law, in order to determine whether an agreement between competitors, or a decision by an association of competitors, reveals a sufficient degree of harm to competition to constitute a restriction of competition 'by object' within the meaning of Article 101 TFEU, regard must be had to: (i) the content of the agreement's provisions, (ii) its objectives, and (iii) the economic and legal context of which it forms a part. When In making this determination, it is also necessary to consider the nature of the goods or services affected, and the real conditions of the functioning and structure of the market or markets in question. All of this sounds very much like a rule of reason evaluation.

The ECJ determined that the GC should have applied this standard when it examined whether the CB's activities caused a sufficient degree of harm to competition to constitute a "by object" restriction. The ECJ added that even though the parties' intentions are not a necessary factor in determining whether an agreement is restrictive "by-object," as noted above, there must be consideration of the content of its provisions, its objectives, the economic and legal context of which it forms part, and the nature of the goods of services affected. The ECJ annulled the GC's judgment, declaring that the GC had failed to properly apply the essential criteria.

Analysis

The CB judgment was a rather strongly worded statement by the ECJ, and contains a cautionary message to the Commission and all national authorities and courts relying on *Expedia*. According to the ECJ, the concept of restriction of competition "by object" can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that there is no need to examine their effects. The ECJ's CB judgment clarifies three important notions:

(i) an alleged restriction "by object" is to be examined on the basis of its objectives and in its economic and legal context ;

(ii) the fact that an agreement simply has the potential to restrict competition is not enough to qualify it as a restriction "by object," and therefore if the type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the Commission should examine its likely effects on competition; and

(iii) a restriction "by object" can only be found with respect to coordination that "reveals a sufficient degree of harm to competition."

These notions imply that the ECJ favors an extensive and almost full judicial review of the Commission's competition decisions, and also requires the Commission to apply a more detailed assessment of the arguments of the parties and the relevant factors before concluding that a restraint harms competition in such a way that it should be qualified to be a restriction "by object," as meant by article 101 TFEU.

The Impact of the CB Decision

A similar approach as in *Cartes Bancaires* was taken on the same day as the ECJ decision by Advocate-General Wahl (AG Wahl), in his opinion in *FNV Kunsten Informatie en Media v. Staat der Nederlanden*. He considered whether a collective labor agreement between associations of employers and associations of employees, pursuant to which self-employed persons perform the same work as employees of a company, fell outside article 101 TFEU, because the provision was contained in a collective labor agreement. AG Wahl took the view that "the fact that a contractual provision in a collective agreement lays down minimum tariffs for self-employed persons in competition with workers for the same job is not in itself enough to bring those provisions within the scope of the antitrust rules."[6] The advocate general advocated a more cautious approach in this assessment, in line with the ruling of the ECJ in CB.

The same view possibly had already been considered by Advocate-General Kokott in para. 43 of her opinion in the 2012 Expedia ruling, when she stated: *"Consequently the national competition authorities and courts are free to proceed against agreements between undertakings below the thresholds of the* de minimis *notice, provided that they have taken due account of the Commission's guidance in the notice and that, in the particular case, there is evidence, other than the market shares of the undertakings concerned, which suggests that the effect on competition is appreciable."*

There is a reason for applying a rule of reason to alleged restrictions "by object." Parties should not be sanctioned for intending to restrict competition when they are unable to do so.

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[1] Case 5/69 *Völk v Vervaecke* [1969] ECR 295, paras. 5-7.
[2] Case C-226/11 *Expedia* December 13, 2012, para. 37.
[3] See also *GT Alert,* "ECJ eliminates Noticeability Test in Regard to Restriction of Competition by Object" of January 2013 by Hans Urlus and Sanne Mulder, and "HvJ EU Expedia en de mededingingsrechtelijke merkbaarheid, Gevolgen voor de Nederlandse praktijk," *Markt & Mededinging*, Aug. 1, 2013.
[4] Case C-67/13 P *Groupement des cartes bancaires* Sept. 11, 2014.
[5] Case C-32/11, *Allianz Hungária a.o./Gazdasagi Versenyhivatalon* March 14, 2013.
[6] Opinion of Advocate-General Wahl at Case C-413/13 *FNV Kunsten Informatie en Media v. Staat der Nederlanden* Sept. 11, 2014 para. 99.

Parental Liability For the Conduct of A Subsidiary

By Hans E. Urlus, Emilie van Hasselt, Teresa Charatjan and Jacomijn Christ* – Amsterdam

On Sept. 3, 2014, the Commission announced that it fined four smart card chip producers a total of EUR 138 million ($210 million) for breaching article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA) through a number or bilateral contacts during a two year period in which they discussed prices, price trends, and production capacity.[1] The Commission found that the contacts affected the parties' responses to customer requests to lower prices.[2] According to the Commission, the contacts reduced uncertainty as to each party's behavior in the market and therefore violated article 101.

A cartel member that had revealed the existence of the cartel to the Commission was rewarded with full immunity from the imposed fine pursuant to the Commission's Leniency Notice.[3] However, even though one of the parties had divested its smart card chips subsidiary after the infringement period, the Commission nevertheless held the parent company liable. By doing so, the Commission once again underlined the principle that a leniency application by the acquirer of a business can immunize the infringer (and its new parent), but it does not shelter the former parent from its parental liability for the infringement.[4]

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[1] European Commission press release Sept. 3, 2014.
[2] Commission Decision of Sept. 3, 2014 Case AT.39574 Smart Card Chips, not yet public http://ec.europa.eu/competition/antitrust/cases/dec_docs/39574/39574_2237_5.pdf.
[3] Commission notice of Dec. 8, 2006 on immunity from fines and reduction of fines in cartel cases OJ C 298.
[4] See also the decision of the Dutch Court of Justice Arnhem-Leeuwarden of Sept. 2, 2014 ECLI:NL:GHARL:2014:6766.

EU Harmonized Legislation Concerning Collective Actions For Damages Under National Law

By Hans E. Urlus, Emilie van Hasselt, Teresa Charatjan, and Jacomijn Christ* – Amsterdam

A Commission decision concluding that EU competition law was infringed is considered to be binding proof that the illegal behavior took place. Based on this presumption, injured citizens and companies can claim damages before the national courts. In order to facilitate such private, or collective, damages, and to harmonize national laws in this field, the Commission has proposed legislation in a Directive on Antitrust Damages Actions (Directive), for claims by victims of EU competition law violations.[1] The Directive is intended to optimize the relationship between private enforcement of EU competition law through damages actions and public enforcement of those rules by the Commission and national competition authorities (NCA). The European Union is set to approve the Directive shortly, and the Member States will have two years to enact their respective implementing regulations.

The rules contained in the Commission Directive deal with evidence, the effect of NCA decisions, the nature and extent of liability, limitation and settlements in order to remove any practical obstacles when injured pasrties seek compensation for infringements of EU Competition law.

In order to remedy information asymmetry, which typically exists in antitrust proceedings, the Directive also provides for the possibility of disclosure of evidence and therefore for easier access to necessary evidence. A *"reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of a claim for damages"* will have to become the legal standard to obtain a disclosure order, or any other national equivalent like a provisional judgment. Disclosure requests must be specific and proportionate. The scope, confidentiality, and cost of gathering the information requested is to be taken into consideration by a court. Any failure to comply with disclosure obligations may be sanctioned, *e.g.*, by giving the court the possibility to draw adverse inferences from withholding such information. Leniency corporate statements and settlement submissions will be excluded from disclosure. However, other information collected in administrative proceedings, as well as withdrawn settlement submissions, may be disclosed if the authority has closed the proceedings.

The Directive empowers national courts to estimate the harm caused by anticompetitive infringements on the basis of the available evidence. In the case of cartel agreements, claimants will benefit from a rebuttal presumption that they have suffered harm. Furthermore, any participant in an infringement is held (jointly and severally) liable for the harm caused to injured parties. This does not apply to infringers who have received immunity pursuant to the Commission's Leniency Notice.

Injured parties will have at least five years to bring damages claim. This time period will start from the moment that the injured party discovers that it has suffered harm from the infringement. In the event that a NCA commences infringements proceedings, the five-year period will be suspended in order to provide the party a choice of waiting until the public proceedings are over, after which the injured party will have one year to bring a damages action.

[1] Directive of certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

New EU Consultation On Standardization Activities

By Hans E. Urlus, Emilie van Hasselt, Teresa Charatjan, and Jacomijn Christ* – Amsterdam

The EU Directorate-General Enterprise and Industry recently launched a period of consultation addressed to companies of all sizes, organizations, public authorities, and citizens interested in EU standardization activities. They all are welcome to comment on intellectual property rights. The consultation on "patents and standards" for new technologies runs from Oct. 14, 2014 to Jan. 31, 2015.

Participants are required to answer a questionnaire that focusses on 8 key issues:

1) Prospective fields of standardization for patent-protected technologies;
2) Adaptation of rules and practices to the fast-changing economic and technological environment;
3) Communication on patents for abuse prevention;
4) Challenges of patents' transfers to new owners;
5) Effective use of patent pools;
6) Definitions of the criteria for standardization;
7) Solutions to litigations related to patent standardization;
8) Guarantee of royalties for patent holders.

A EU study has indicated what a strategic role patents play in achieving broad and rapid diffusion of innovative technologies, especially in consumer electronics, the automotive sector, and in smart grids alongside telecommunication. These patents seek to remove unnecessary barriers in the market and in facilitating the interoperability between products. The result of this questionnaire will therefore be very interesting.

China Developments

Anti-monopoly Probe and Enforcement in China – Paying the Price for Price!

By Dawn Zhang and Eric Zhang– Shanghai

Shortly after the sixth anniversary of effectuating the PRC Anti-monopoly Law, the National Development and Reform Commission (the NDRC) and its local branches made front page news with respect to an enforcement focus on automobile and related upstream and downstream industries. As of Sept. 28, NDRC has formally issued 12 decisions to 12 Japanese auto component manufacturers — two immunity decisions and 10 punitive decisions — with total monetary penalties of RMB1.2 billion (approximately $195.06 million). NDRC's local branches, such as Shanghai NDRC, also penalized a U.S automobile manufacturer. Moreover, the NDRC currently is investigating a telecommunication giant and other automobile manufacturers. The reason for this enforcement barrage is very straightforward: price fixing will not be tolerated by the NDRC.

Price Fixing Is Prohibited In the PRC

PRC Anti-monopoly Law provides that business operators are prohibited from concluding horizontal agreements on fixing prices in any way, if it has an effect or will result in eliminating, restricting, or disordering competition in a relevant market. Also, business operators are prohibited from restricting or fixing the resale prices of products resold by their distributors or retailers — vertical price fixing — if they have the same effect as is prohibited for horizontal agreements. In addition to business operators, industrial associations are prohibited from organizing business operators in an attempt to reach arrangements that resemble horizontal or vertical agreements.

In a typical enforcement action, Company A, "a leading supplier of advanced automotive technologies, systems and components for all the world's major automakers," as stated on the company's global website, was found by the NDRC to have engaged in frequent bilateral or multilateral negotiations with its competitors – one or more of the 11 Japanese auto components manufactories simultaneously penalized by the NDRC – by way of meetings, emails and conference calls from the second half of 2000 up to October 2009, to have exchanged information with respect to the prices of certain auto components as well as the proposed quotes for bidding for business with automobile makers in China, resulting, according to the NDRC, in massive agreements on bidding prices. The products involved were distributed in China to some automobile makers. The NDRC concluded that the agreements had an impact on eliminating, disordering and restricting competition in the relevant market, which directly increased the prices of the auto components involved, and indirectly seriously disadvantaged and jeopardized the interests of downstream automobile dealers and end user consumers. The NDRC imposed a total penalty of roughly RMB150 million (approximately $243,831.07), which accounts for 4 percent of sales generated from the products under the Horizontal Agreement in China in 2013.

However, among all 12 decisions, two companies were not penalized, including Company A. Although the NDRC found that the two companies had seriously violated the PRC Anti-monopoly Law, in consideration of their proactive support of the NRDC investigations by providing evidence and cooperation which substantially facilitated the investigations, NDRC decided to exempt these two companies without any penalty. Its purpose was to inspire other companies currently engaged in cartel activities in various industries to proactively cooperate with NDRC's anti-monopoly enforcement.

The Shanghai NDRC also penalized a renowned U.S. automobile manufacturer on the ground that it had entered into vertical agreements with three distributors restricting their resale prices. Shanghai NDRC fined the manufacturer RMB31.6820 million (roughly $5.15 million) and a total of RMB2.1421 million (roughly $348,207.02) on the three distributors, respectively.

As a matter of policy, the NDRC initiates an investigation under its very limited resources only after it has collected solid evidence about cartel activity. Whistleblowers—such as the two companies granted immunity in the investigations referred to above, usually provide such solid evidence. The NDRC deals with a whistleblower in a careful manner, however, and will not initiate an investigation, or strike a company in a dawn raid, without solid evidence showing that there is indeed a likely anticompetitive horizontal or vertical agreement.

Is Enforcement Biased Against Foreign Companies?

There have been criticisms that the NDRC's recent enforcement activities have demonstrated a strong bias against foreign companies, especially in industries where foreign companies are market leaders or dominant, such as automobile manufacturing. However, the record does not support these claims. In a recent case, NDRC penalized Zhejiang Insurance Association, a PRC industrial association, due to its formation of a horizontal agreement by and between its subordinate insurers to fix the fees charged by agents for commercial automobile insurance. The penalties attributable to such cartel agreement consisted of RMB500,000 (roughly $81,277.02).

What Should A U.S. Company Do Going Forward?

Several NDRC investigations are ongoing. Antitrust enforcement will expand to other industries in order to purge any unfair competition and monopolies currently existing in the market in China. Additionally, in the future, it is likely that the NDRC may collaborate with other enforcement authorities in its investigations. Hence, all the players in a market have to learn from the lessons imposed on their peers.

How should be this done? If a U.S. company desires to compete in the PRC in a manner that is compatible with the Chinese market, it should review or formalize its antitrust compliance policy, ensure that it is active and that its employees are aware of the significance of such policy. Like Foreign Corrupt Practices Act and anti-bribery compliance, we believe that antitrust compliance policy may increasingly become a critical strategy in the PRC. Of most importance in the PRC, such a compliance policy must strictly prohibit the sharing of price information with competitors in all manners-- letter, phone, email and oral communications.

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